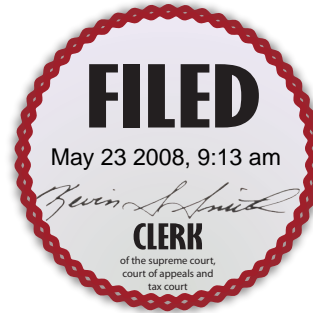


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**TANISHA D. WILLOUGHBY**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEPHEN R. CARTER**  
Attorney General of Indiana

**JESSICA A. MEEK**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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BRIAN PINNER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0709-CR-529

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jose Salinas, Judge  
Cause No. 49G17-0706-FD-115528

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**May 23, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Following a bench trial, Brian Pinner was convicted of intimidation,<sup>1</sup> as a Class D felony, and was adjudicated a habitual offender.<sup>2</sup> He appeals raising only one issue for our review: whether the evidence was sufficient to support his conviction for intimidation.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On June 20, 2007, Officer D.P. was dispatched to the home of Pinner and his wife, S.T. Officer D.P. learned that a fight had occurred between Pinner and S.T. because Pinner had brought another woman into the home. The fight resulted in S.T. having a swollen eye and Pinner having scratches on his chest. Due to Pinner's unruliness during the investigation, Officer D.P. placed Pinner in handcuffs and took him outside the residence in order to question S.T. While handcuffed, Pinner shouted obscenities directed at Officer D.P., his assisting officer, and S.T. Shortly thereafter, as Officer D.P. was completing paperwork in his patrol car, and Pinner was sitting handcuffed outside the car, he told Officer D.P. that Officer D.P.'s kids were going to die. Officer D.P. perceived Pinner's words as a threat, and was fearful for himself and his family.

The State charged Pinner with intimidation, as a Class D felony, domestic battery, as a Class A misdemeanor and as a Class D felony, battery, as a Class A misdemeanor and as a Class D felony, and as a habitual offender. On July 26, 2007, a bench trial was

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<sup>1</sup> See IC 35-45-2-1.

<sup>2</sup> See IC 35-50-2-8.

held and Pinner was found not guilty on all counts apart from the intimidation and habitual offender charges. The trial court took the remaining two charges under advisement. On August 3, 2007, the trial court found Pinner guilty of the intimidation and habitual offender charges. The trial court sentenced Pinner to 545 days, 180 of which were to be served at the Department of Correction and the remaining 365 days were to be served on home detention. The habitual offender conviction caused the sentence to be increased by 545 days, all of which was suspended to probation. Pinner now appeals.

### **DISCUSSION AND DECISION**

Pinner asserts there is insufficient evidence to support his intimidation conviction. When we review a claim that a conviction is not supported by sufficient evidence, we may not reweigh the evidence or assess the credibility of witnesses. *Weis v. State*, 825 N.E.2d 896, 905 (Ind. Ct. App. 2005). We affirm a conviction if the jury heard substantial evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt. *Id.* When making this determination, we consider only the evidence favorable to the verdict and all reasonable inferences to be drawn from that evidence. *Id.*

To support a conviction for intimidation in this case, the State was required to establish that Pinner: (1) with the intent to place another person in fear of retaliation for a prior lawful act, (2) communicated a threat, (3) to another person, (4) who was a police officer. IC 35-45-2-1; *see Dennis v. State*, 736 N.E.2d 300, 303 (Ind. Ct. App. 2000). A

“threat” is defined as an “expression, by words or action, of an intention to ... unlawfully injure the person threatened....” IC 35-45-2-1(c)(1).

In *Johnson v. State*, 743 N.E.2d 755 (Ind. 2001), the defendant was charged with intimidation as a Class A misdemeanor. *Id.* at 756. The defendant was obstructing traffic with his car after exiting the car and leaving it parked in the middle of a street. *Id.* at 755. An out-of-uniform police officer driving an unmarked police car was directly behind the defendant’s car. *Id.* The officer asked the defendant several times to move along and was addressed with obscenities in response. *Id.* at 756. As the officer proceeded to exit his car, the defendant lifted his jacket divulging the top of a handgun. *Id.* The defendant then stated, “don’t even think it.” *Id.*

Following a bench trial, defendant was convicted as charged. *Id.* at 756. On appeal, we reversed the trial court’s decision, finding the evidence insufficient to sustain the conviction. *Id.* After granting transfer, the Indiana Supreme Court held that the displaying of the firearm coupled with the statement “don’t even think it,” which was preceded by two obscene remarks, was sufficient for a trier of fact to conclude that the defendant had communicated a threat within the meaning of the intimidation statute. *Id.* at 757. Additionally, it held that the officer’s request that the defendant move his car along was a prior lawful act; thus the evidence was sufficient to show that the defendant threatened the officer “with the intent to place him in fear of retaliation for a prior lawful act.” *Id.*

Here, Officer D.P. testified that Pinner conveyed to him, while handcuffed and seated on the sidewalk outside the police car, that Officer D.P.’s kids were going to die.

*Tr.* at 51. The record shows that leading up to this declaration, Pinner had been screaming profanities at both of the officers and S.T. *Id.* at 18-19. Officer D.P. testified that Pinner's belligerence, combined with his comment regarding Officer D.P.'s children, caused him to become concerned for the safety of his family, as well as for his own safety. *Id.* at 51-52, 57. Pinner's exclamation of obscenities during his arrest for domestic violence, combined with his comment regarding Officer D.P.'s children, was comparable to the defendant in *Johnson* shouting obscenities at the officer, which was ultimately followed by flashing a gun and stating "don't even think it." Here, as in *Johnson*, both intimidator's actions and words had the intention of placing another person in fear of retaliation. We find Pinner's statement that Officer D.P.'s children were going to die was sufficient for a jury to infer that Pinner communicated a threat within the meaning of the intimidation statute.

Pinner notes that for a conviction under the intimidation statute, a person must communicate a threat to another with the intent of placing that person in fear of retaliation for a prior lawful act. *Appellant's Br.* at 7 (citing *Casey v. State*, 676 N.E.2d 1069 (Ind. Ct. App. 1997)). He contends that the State alleged the prior lawful act was investigating the crime of domestic violence and the threat occurred while the investigation was still occurring. *Id.* Thus, the threat did not occur following a prior lawful act.

We disagree. Officer D.P.'s investigation of the domestic violence constituted a prior lawful act. Handcuffing Pinner was intended to facilitate the investigation, and thus was part of the investigation. At the time Pinner's remark about Officer D.P.'s children

was uttered, everything that Officer D.P. had done during the course of the investigation was a prior lawful act. Whether the investigation was completed at the time of Pinner's threat is of no moment.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.